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**2001 OAL DETERMINATION NO. 11-L**

(Gov. Code sec. 11340.5; Cal.Code Regs., tit. 1, sec. 123(c))

December 14, 2001

Kenneth R. Walton
E-03937
Box 4000-13-J-2L
Vacaville, CA 95696-4000

2001 DEC 14 PM 1:44
ENDORSED FILED
IN THE OFFICE OF
BILL JONES
SECRETARY OF STATE

Re: Request for Determination concerning the Board of Prison Terms' Document
captioned "Parole Violators Return to Custody Offense Codes (Revised 9/97)."
OAL File No. 00-007.

Dear Mr. Walton:

You have requested the Office of Administrative Law ("OAL") to issue a determination as to whether the Board of Prison Terms' document captioned "Parole Violators Return to Custody Offense Codes (Revised 9/97)" constitutes a "regulation" of the Board of Prison Terms that must be adopted pursuant to the Administrative Procedure Act ("APA").¹

In issuing a determination, OAL renders an opinion as to whether the challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not, adopted pursuant to the APA.²

1. Penal Code section 5076.2, subdivision (a), provides in part: "[a]ny rules and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms shall be promulgated and filed pursuant to [the APA]. . . ."

2. Pursuant to California Code of Regulations, title 1, section 123, subsection (c), OAL is issuing this determination as a summary determination letter. Section 123 of title 1 of the California Code of Regulations provides in part the following:

"(b) OAL shall not accept for filing any request for determination if OAL finds that the state agency rule being challenged:

- (1) has been superseded;
- (2) has expired by its own terms;
- (3) has been declared in writing by the state agency under penalty of perjury, in accordance with Code of Civil Procedure Section 2015.5, to have been rescinded or to no longer be in effect;
- (4) has been nullified by a court in a judgment that has become final;
- (5) is contained in a regulation adopted pursuant to the APA;

The document that you are challenging contains suggested parole revocation assessment ranges with code numbers that are used “. . . when good cause has been found on a parole violation charge or charges. The ranges are suggested for a first term offender with no prior returns to custody. . . .” The document also states that “[a] revocation assessment may be aggravated by such factors as the parolee’s term status, prior parole violations, multiple parole violation charges and escalating and repetitious behavior. Factors of mitigation may also be considered in making an assessment” The document has 235 types of violations with a code number for each violation that are arranged from violations with a range of zero to four months to violations with ten to twelve months of suggested parole revocation.

Government Code section 11342.600 defines “regulation” to mean “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” For an agency rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.³

The challenged rule meets the definition of “regulation” in that the parole revocation assessment ranges are applied generally to all members of the open class of all parolees who are first term parole violators who have had no prior returns to custody. The rule also implements, interprets, or makes specific Penal Code section 3057, subdivision (a).⁴

On November 6, 2001, the Board of Prison Terms submitted a regulatory action to OAL that, pursuant to the APA, adopted section 2646.1 and amended section 2646 of title 15 of the California Code of Regulations. Section 2646.1 contains parole revocation assessment guidelines for a “. . . parolee with no prior returns to custody.” (OAL File No. 01-1106-01S.) Section 2646.1 is substantially similar to the parole revocation assessment ranges that you had challenged in your determination request. On November 20, 2001, OAL approved the regulatory action as meeting all applicable legal requirements of the APA. Pursuant to Government Code section 11343.4, section 2646.1 will become effective on December 20, 2001.

(6) is contained in a California statute;

(7) is clearly within the scope of an express statutory exemption from the APA; or

(8) is the same rule, or is substantially the same (i.e., has the same effect) as a rule from the same state agency, on which OAL has already issued a determination.

“(c) If, after accepting a request for determination, OAL finds that the challenged state agency rule falls within subsection (b), OAL may at any time issue a summary determination letter instead of a determination pursuant to sections 124, 125, and 126. Any summary determination letter shall be issued pursuant to section 127. [Emphasis added.]”

3. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).

4. Penal Code section 3057, subdivision (a), declares in relevant part that “[c]onfinement pursuant to a revocation of parole in the absence of a new conviction and commitment to prison under other provisions of law, shall not exceed 12 months. . . .”

Sincerely,

Handwritten signature of Barbara Eckard in cursive script, with a small 'dmc' written at the end of the signature.

Barbara Eckard
Senior Counsel

Debra M. Cornez
Senior Counsel
Determinations Program Coordinator

for: David B. Judson
Deputy Director and Chief Counsel

cc: Carol A. Daly, Chairperson
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